In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-180

SOL C. SIEGEL AND ETHEL B. SIEGEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition in this income tax refund case is whether summary judgments were properly entered in favor of the government after the court of appeals on the first appeal reversed the summary judgments originally entered for petitioners in the district court. Petitioners claim that there still remains a triable issue of fact.

1. The pertinent facts, which are set forth in an extensive stipulation, are as follows. Petitioner Sol C. Siegel was President of Sol C. Siegel Productions, Inc. ("Productions"), and owned more than 85 percent of its stock. Petitioner Ethel B. Siegel owned more than 4 percent. They brought these suits for refund of income taxes assessed and paid by them as transferees of Productions for its taxable years ended May 31, 1962 and 1963 (Pet. App. C 3-4).

The substantive tax controversy had been previously litigated in the Tax Court. It arose out of a contract between Productions and Loew's, Inc. ("Loew's"), under which Productions was to produce, and Loew's was to finance and distribute, a number of motion pictures. After costs and expenses were recovered, profits, if any, were to be divided. As a result of disagreements and the desire of Loew's to employ petitioner Sol C. Siegel, these agreements were amended so that if Productions completed and delivered two specified motion pictures, Loew's guaranteed payment of $300,000 to Productions, half on June 1, 1961 and half on June 1, 1962. The motion pictures were completed and delivered, but prior to the first date for payment, Productions voted to liquidate. On March 21, 1961, Productions delivered to its shareholders, including petitioners, the right to the payments to be made on June 1, 1961 and 1962. Loew's made the payments to the shareholders on schedule (Pet. App. C 4-6).

The Commissioner of Internal Revenue asserted a deficiency against Productions on the ground that the payments to the shareholders were income of Productions for its taxable year ended May 31, 1961, the year of its liquidation. The Tax Court indicated that the payments were income of Productions, but held that they were not income in the only year before the court, Productions' taxable year ended May 31, 1961. See *Sol C. Siegel Productions, Inc.* v. *Commissioner*, 46 T.C. 15 (Pet. App. C 6-7, 10-11). The Commissioner thereafter assessed deficiencies against petitioners as transferees of Productions for its taxable years ended May 31, 1962 and 1963, the years of payment. Petitioners acknowledged that they were transferers, paid the taxes assessed, and brought these suits for refund (Pet. App. C 6).

In this litigation, the parties submitted to the district court a lengthy stipulation of agreed facts (R. 62-80),[1] accompanied by documentary attachments of more than two hundred pages (R. 81-348), stating that they had compiled "a mutually acceptable and complete Stipulation of Agreed Facts which will be incorporated as part of defendant's motion for summary judgment" (R. 42-43), and filed cross-motions for summary judgments. The district court, reciting that there was "no genuine issue as to any material fact," entered judgments for petitioners (Pet. App. E 14-15). On the first appeal, the court of appeals reversed (Pet. App. C 3-12), concluding that "the Commissioner correctly determined that the payments must be included in the gross income of the corporation" (Pet. App. C 12).

Petitioners thereupon filed a Motion for Clarification and Petition for Rehearing in the court of appeals, contending that the opinion of the court appeared to contemplate entry of judgments for the United States and seeking, instead, that the case be remanded for further proceedings. Except for deleting two sentences from its opinion, the court of appeals denied this motion (Pet. App. D 13) and its judgment was filed and spread upon the minutes of the district court (R. 424).

Upon petitioners' motion (R. 425-426), the district court vacated the judgments for the United States

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[1] "R." references are to the record in the court of appeals in *Ethel B. Siegel* v. *United States*. Because of the length of the stipulation of facts and documentary attachments, these materials were incorporated only by reference in the record in *Sol. C. Siegel* v. *United States*.

entered on the mandate of the court of appeals, and stated that the original motion of the United States for summary judgment would be deemed to be before the court, subject to the right of petitioners to file additional points and authorities (R. 447). Thereafter, petitioners submitted a memorandum (R. 449-457) and the affidavits of four prospective witnesses (R. 459-470) in support of their position that there remained a triable issue of fact. After considering this additional material, the district court entered judgments for the United States (Pet. App. B2). The court of appeals affirmed *per curiam* (Pet. App. A1).

2. As this court pointed out in *First Nat. Bank* v. *Cities Service Co.*, 391 U.S. 253, 259, "[T]he question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." Here, after the issues had been once litigated in the Tax Court, the parties submitted to the district court a stipulation of facts with documentary attachments that they agreed was "mutually acceptable and complete." The 1958 contract between Productions and Loew's established the right of Productions to payments of $300,000. Its terms and the circumstances of its making established that these payments had been earned by Productions and constituted income to Productions under this Court's decision in *Lucas* v. *Earl*, 281 U.S. 111.

It is well settled that the disputed construction of a contract is an issue appropriate for resolution by summary judgment. *Green* v. *Valve Corp. of America*, 428 F. 2d 342 (C.A. 7); *Universal Fiberglass Corp.* v. *United States*, 400 F. 2d 926 (C.A. 8). Where, as here, the construction of a contract is determinative of the

contested issue, it is appropriate for an appellate court, if it rejects the construction of the lower court, not only to reverse a summary judgment but also to order judgment for the other party. *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (C.A. 2); *Stein* v. *Oshinsky*, 348 F. 2d 999 (C.A. 2), certiorari denied, 382 U.S. 957. Thus, the court of appeals correctly ordered judgment for the United States on the first appeal.

But that was not the end of this extended litigation. The district court vacated the judgment that had been routinely entered on the mandate of the court of appeals and afforded petitioners an additional opportunity to argue that a triable issue of fact remained. After consideration of petitioners' argument and affidavits setting forth the evidence they sought to introduce, the district court entered judgments for the United States and the court of appeals affirmed. Thus, there is no reason for this Court to review the judgment of both courts below that there is no triable issue of fact remaining in this litigation.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.